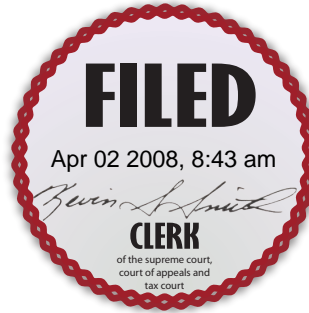


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JERRY LARKEY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 27A02-0711-CR-923

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APPEAL FROM THE GRANT SUPERIOR COURT  
The Honorable Natalie Conn, Judge  
Cause No. 27D03-0608-FD-682

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**April 2, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Jerry Larkey appeals his convictions for Class A misdemeanor operating a vehicle while intoxicated (“OWI”) and Class D felony OWI with another OWI conviction within the last five years. We affirm.

## **Issue**

Larkey raises one issue, which we restate as whether a State witness’s reference to a toxicology report amounted to fundamental error.

## **Facts**

On August 6, 2006, Lieutenant Michael Andry of the Grant County Sheriff’s Department was patrolling Indiana Wesleyan University when he noticed a vehicle driven by Larkey cross the center line and nearly cause an accident. Lieutenant Andry followed Larkey and initiated a traffic stop after observing Larkey cross the center line a second time.

While speaking to Larkey, Lieutenant Andry observed that Larkey’s speech and movement were very slow and that he seemed confused. Lieutenant Andry asked Larkey to exit his vehicle and noticed that Larkey’s eyes were red, glassy, and mostly closed. Larkey agreed to perform field sobriety exams. A chemical breath test showed that Larkey was not under the influence of alcohol. However, Lieutenant Andry, a certified drug recognition expert, concluded that Larkey was under the influence of controlled substances after observing Larkey fail a twelve-step drug influence exam. During a conversation with Larkey, Lieutenant Andry learned that Larkey had taken Alprazolam (Xanax) before driving. A search of Larkey’s vehicle and person uncovered separate

prescription bottles for Alprazolam and methadone that were both prescribed to Larkey. Larkey had been prescribed ninety pills of Alprazolam three days earlier, but only twenty-two were found in the bottle. The prescription was for three pills per day.

The State charged Larkey with Class A misdemeanor OWI. During a jury trial, Lieutenant Andry was asked if his conclusion of Larkey being under the influence of drugs was confirmed. Lieutenant Andry answered in the affirmative but gave no details of testing results. The following relevant dialogue took place during the State's rebuttal and subsequent cross-examination of Lieutenant Andry by the prosecutor and defense counsel:

[Prosecutor]: Okay and um, you already testified as to what your conclusion was uh, with regard to Mr. Larkey operating a vehicle, is that correct?

[Lieutenant Andry]: Yes, sir.

[Prosecutor]: And I believe you testified earlier to that your opinion and your observations have been confirmed, is that correct?

[Lieutenant Andry]: That's correct.

[Prosecutor]: Okay. I don't have any further questions.

[Trial Court]: Anything further?

#### Cross Examination

[Counsel for Larkey]: They have been confirmed with your own tests?

[Lieutenant Andry]: Toxicology by the Indiana Department of Toxicology confirmed the tests.

[Counsel for Larkey]: I don't think that has been presented here today at all.

[Lieutenant Andry]: You just asked me. That's how I got confirmatory tests.

[Counsel for Larkey]: Well that's not confirmed if it's not presented here in evidence.

[Lieutenant Andry]: That's how it is confirmed.

[Counsel for Larkey]: And it's not here?

[Lieutenant Andry]: I can supply it.

[Counsel for Larkey]: I'm waiting. This is your chance.

[Lieutenant Andry]: Do we have the toxicology reports?

[Counsel for Larkey]: It's your case to present your evidence. You don't have it.

[Prosecutor]: He testified on direct without any objection that his consults were confirmed. And we talked about this, Your Honor. He testified how they got [sic].

[Counsel for Larkey]: No, we certified that he's taken his medications.

[Trial Court]: There has been no evidence of toxicology reports being confirmed.

[Prosecutor]: It was on direct exam. My case in chief.

[Trial Court]: There was nothing presented about toxicology.

[Prosecutor]: I don't have any further questions.

[Counsel for Larkey]: No further questions.

[Prosecutor]: I don't have any further rebuttal.

[Trial Court]: Anything further?

[Counsel for Larkey]: Oh, no. Nothing further.

Tr. pp. 135-136.

The jury found Larkey guilty of Class A misdemeanor OWI. Larkey subsequently pled guilty to Class D felony prior conviction for OWI with another OWI conviction within five years.

### **Analysis**

Larkey argues fundamental error occurred in the form of an “evidentiary harpoon” when the State attempted to reference a confirmatory toxicology report through Lieutenant Andry’s testimony. We disagree with Larkey. An evidentiary harpoon occurs when the prosecution places inadmissible evidence before the jury for the deliberate purpose of prejudicing the jury against the defendant and his defense. Evans v. State, 643 N.E.2d 877, 879 (Ind. 1994). Because Larkey did not object to Lieutenant Andry’s statement, he must show that the statement amounted to fundamental error. See Seide v. State, 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). Fundamental error is a substantial blatant violation of basic principles rendering a proceeding unfair to the defendant and depriving the defendant of fundamental due process. Id. (quoting Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000)). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Taylor v. State, 717 N.E.2d 90, 93 (Ind. 1999).

We first note that Larkey's counsel arguably invited the error and, therefore, it does not equate to a reversible fundamental error. "The doctrine of invited error is grounded in estoppel." Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 133 (Ind. 2005). Under this doctrine, "a party may not take advantage of an error that she commits, invites or which is the natural consequence of her own neglect or misconduct." Witte, 820 N.E.2d at 133-134. We believe Lieutenant Andry's brief statement regarding the confirmation of his observations did not jeopardize Larkey's right to a fair trial by damaging his case in front of the jury. No reference of a toxicology report was made during Lieutenant Andry's testimony until Larkey's counsel pursued the issue in depth and invited the error during cross-examination. Because Larkey's counsel invited the error during cross-examination, he cannot benefit from the error on appeal. See Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005).

Even if the error was not invited, we believe it was not fundamental. There was substantial additional evidence for the jury to consider that supported Larkey's conviction. Lieutenant Andry's expertise in drug influence recognition and relevant testimony regarding Larkey's failure under testing allowed the jury to reasonably infer that Larkey was under the influence. Additionally, there was evidence from which the jury could have inferred that Larkey had taken Xanax before driving.

Larkey's counsel also fails to cite any authority on appeal showing that toxicology reports are automatically or necessarily inadmissible. We do not agree with Larkey's argument that toxicology reports are basically equivalent to polygraph examinations. We do not believe that a reference of a toxicology report amounts to such prejudice

within the minds of the jury and, therefore, amounts to reversible fundamental error. See McQueen v. State, 862 N.E.2d 1237, 1242 (Ind. Ct. App. 2007) (Reference of a toxicology report that was not admitted into evidence was not found to be fundamental error). Furthermore, the jury was free to disregard the toxicology statement after the trial court emphasized to the jury that no evidence of such had been presented.

### **Conclusion**

The admission of evidence referencing a toxicology report during Lieutenant Andry's testimony did not constitute reversible fundamental error. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.